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 Italian Restaurant, Four Fingers, LLC dba Salt & Lime Modern
 Mexican Grill, Six Fingers, LLC dba Black & Bleu Restaurant,
 and Joseph M. Popo and Gabriella Popo*

**UNITED STATES DISTRICT COURT
 DISTRICT OF ARIZONA**

AMY PATTERSON,

Plaintiff,

v.

TWO FINGERS, LLC, an Arizona
 corporation dba Stone and Vine Urban
 Italian Restaurant; FOUR FINGERS, LLC,
 an Arizona corporation dba Salt & Lime
 Modern Mexican Grill; SIX FINGERS,
 LLC, an Arizona corporation dba Black &
 Bleu Restaurant; JOSEPH M. POPO and
 GABRIELLA POPO,

Defendants.

TWO FINGERS, LLC, an Arizona
 corporation dba Stone and Vine Urban
 Italian Restaurant; FOUR FINGERS, LLC,
 an Arizona corporation dba Salt & Lime
 Modern Mexican Grill; SIX FINGERS,
 LLC, an Arizona corporation dba Black &
 Bleu Restaurant; JOSEPH M. POPO and
 GABRIELLA POPO,

Counterclaimants.

Case No. 2:15-cv-00494-NVW

**DEFENDANTS TWO FINGERS, LLC,
 FOUR FINGERS, LLC, SIX FINGERS,
 LLC, AND JOSEPH M. POPO AND
 GABRIELLA POPO'S RESPONSE TO
 PLAINTIFF'S MOTION TO
 ENFORCE SETTLEMENT
 AGREEMENT AND FOR
 ATTORNEYS' FEES AND
 SANCTIONS**

The Hon. Neil V. Wake

1 v.

2 AMY PATTERSON,

3 Counterdefendant.

4 TWO FINGERS, LLC, an Arizona
 5 corporation dba Stone and Vine Urban
 6 Italian Restaurant; FOUR FINGERS, LLC,
 7 an Arizona corporation dba Salt & Lime
 8 Modern Mexican Grill; SIX FINGERS,
 9 LLC, an Arizona corporation dba Black &
 10 Bleu Restaurant; JOSEPH M. POPO and
 11 GABRIELLA POPO,

12 Third-Party Plaintiff,

13 PETER K. STROJNIK and THE
 14 STROJNIK FIRM L.L.C.,

15 Third-Party Defendants.

16 Defendants Two Fingers, LLC dba Stone and Vine Urban Italian Restaurant, Four
 17 Fingers, LLC dba Salt & Lime Modern Mexican Grill, Six Fingers, LLC dba Black & Bleu
 18 Restaurant and Joseph M. Popo and Gabriella Popo (collectively "Defendants") hereby
 19 Respond to Plaintiff's Motion to Enforce Settlement Agreement and For Attorneys' Fees and
 20 Sanctions (the "Motion"). To be certain, Defendants have made every effort to provide
 21 payment within the estimated time period quoted during the negotiation process, which is
 22 evidenced by payment being made faster than originally estimated. Defendants' counsel make
 23 clear on multiple occasion that payment typically occurs between thirty (30) and sixty (60)
 24 days after receipt of an executed settlement agreement.

25 Such timing was estimated due to the insurer requiring a fully executed settlement
 26 agreement prior to processing checks and necessitating that all payments be processed through
 27 defense counsel's trust account prior to issuance¹. Such impediments to "immediate" payment
 28 were communicated to opposing counsel and an agreement was reached requiring Defense
 counsel to use provide payment "within the earliest possible time following the execution of

¹ Processing through defense counsel's trust account obviates the cumbersome task of
 establishing separate vendor accounts for each Plaintiff firm upon the conclusion of each
 claim.

1 this agreement," instead of the sixty (60) days included in the draft settlement agreement. At
 2 the time this language was agreed to, Plaintiff's counsel was apprised that thirty (30) days
 3 would be the earliest possible time frame, not that payment would be made pursuant to
 4 Plaintiff counsel's arbitrarily imposed deadlines established following the settlement being
 5 reached.

6 The correspondence between the parties makes clear that Plaintiff's counsel was aware
 7 of the estimated payment schedule, that Plaintiff's counsel was continually apprised of the
 8 progress, and that Plaintiff's counsel imposed deadlines with full knowledge Defendants could
 9 not comply. Coupled with Plaintiff's counsel's refusal to withdraw the Motion upon payment
 10 being tendered², it is clear that Plaintiff's counsel's objections are a calculated effort to obtain
 11 additional money and/or fees upon failing to recover as much as desired and/or sought from
 12 the underlying claim. The personal attacks, blatant mischaracterization of facts and timing of
 13 the Motion, belies the improper motives and strategic use of same.

14 For these reasons, Defendants respectfully request that the Motion be denied and that
 15 Defendants be awarded their attorneys' fees incurred responding to the Motion(s).

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. DEFENDANTS DILIGENTLY ENDEAVORED TO REACH AN** 18 **AGREEMENT AS TO THE FORM OF THE SETTLEMENT** 19 **AGREEMENT.**

20 On Friday, June 5, 2015, a settlement was reached between Plaintiff Patterson and
 21 Defendants to resolve their claims against one-another. See *Correspondence from Plaintiff's*
 22 *counsel confirming settlement*, attached hereto as Exhibit "B." On the following Monday,
 23 June 8, 2015, a draft form of agreement was prepared by Wood, Smith Henning & Berman
 24 ("Wood Smith") and delivered to personal counsel for Defendants, Eddie Pantiliat and Juliet
 25 Peters. See *Correspondence*, attached hereto as Exhibit "C." On June 10, 2015, Plaintiff's
 26 counsel was advised that a draft agreement had been drafted and was being discussed among

27 ² See Acknowledgement of Receipt of Settlement Funds, attached hereto as Exhibit
 28 'A.'

1 counsel. *See Correspondence to Strojnik*, attached hereto as Exhibit "D." On June 12, 2015,
 2 counsel for Defendants had finalized their agreement as to the form of the settlement
 3 agreement to be provided opposing counsel. *See Correspondence dated June 12, 2015*,
 4 attached hereto as Exhibit "E." On Tuesday, June 16, 2015, personal counsel for
 5 Defendants, upon obtaining approval from Defendants, provided the draft settlement
 6 agreement to Plaintiff. *See Correspondence transmitting settlement agreement*, attached
 7 hereto as Exhibit "F."

8 Thus, Plaintiff was provided a draft agreement agreed to by all Defendants and their
 9 counsel within seven (7) business days of a settlement being reached. Such a short period of
 10 time is facially reasonable given the number of entities involved, the number of counsel
 11 providing input, and the unique circumstances existing in this case rendering a "form"
 12 agreement inappropriate.

13 **II. DEFENDANTS DILIGENTLY SOUGHT TO RESOLVE DISPUTES**
 14 **REGARDING THE TIMING OF PAYMENT.**

15 On June 16, 2015, Plaintiff's counsel responded by providing proposed redline
 16 changes, inclusive of a requirement for Defendants to provide settlement payments by June
 17 24, 2015 (only eight days after the agreement was circulated). *See Correspondence from*
 18 *Plaintiff*, attached hereto as Exhibit "G." Within five (5) minutes of receiving Plaintiff's
 19 proposed revisions, Wood Smith advised that Plaintiff's counsel's expectations regarding the
 20 timing of payment was wrong, informing Plaintiff's counsel that the carrier's protocols
 21 required an executed agreement to be received prior to processing a check and that the funds
 22 would have to clear through Wood Smith's trust account prior to dispersal to Plaintiff. *See*
 23 *Email Exchange dated June 16, 2015*, attached hereto as Exhibit "H." Wood Smith made
 24 clear, "**Thirty days is a minimum from receipt of a signed agreement.**" See Exhibit "H."

25 Plaintiff's counsel retorted, requesting that Defendants just execute the agreement,
 26 despite a significant dispute as to the timing of payment and the practical impossibility of
 27 providing within the truncated time period demanded. *See Exhibit "H."* The next day, Wood
 28 Smith reiterated that the goal was to "get this wrapped up as soon as possible," but that a firm

1 deadline that could not be guaranteed to be met would be unacceptable. See *Correspondence*
 2 *from Wood Smith*, attached hereto as Exhibit "I." The final agreed to language omitted any
 3 reference to a specific time period (as Defense counsel had requested) for payment.
 4 Defendants agreed to provide payment "within the earliest possible time period following the
 5 execution of the Agreement," which was expressly represented by Defendants on multiple
 6 occasions to be at least thirty (30) days. See *Transmittal of Final Settlement Agreement*,
 7 attached hereto as Exhibit "J." The Agreement was provided to Plaintiff on June 22, 2015.

8 **III. MISUNDERSTANDINGS AS TO THE ALLOCATION OF REMAINING**
 9 **SETTLEMENT AUTHORITY ONLY marginally IMPACTED**
 10 **RESOLUTION OF THE SETTLEMENT.**

11 Unfortunately, while negotiations were ongoing regarding revisions to the proposed
 12 agreement (June 16 to June 22, 2015), it became apparent that there was a misunderstanding
 13 as to the allocation of the agreed to settlement amount among Defendants, the Commercial
 14 General Liability Insurer ("CGL"), and the Employment Practices Liability ("EPL")
 15 Insurer. The EPL carrier was only obligated to defend and contribute toward resolution of
 16 the employment discrimination claims, whereas the CGL insurer was obligated to defend and
 17 indemnify against the defamation claims, only. The EPL policy provided \$100,000 in
 18 coverage, however, defense fees and costs erode available limits^[1]. At the time of settlement
 19 negotiations, an allocation of defense costs between the CGL (non-erosive) and EPL policies
 20 was conducted to ensure sufficient funding was available for a settlement offer. As a result of
 21 such estimates, it was determined that approximately \$70,000 remained under the EPL policy
 22 (subject to change as additional fees and costs were incurred).

23 An initial offer was presented to Plaintiff in the amount of \$100,000, which included
 24 \$30,000 from the CGL carrier and remaining limits under the EPL policy, up to \$70,000
 25 (assuming \$70,000 remained at the time of issuance). Thereafter, Plaintiffs rejected the
 26 settlement offer and demanded \$175,000. See *Correspondence from Strojnik*, attached hereto

27 ^[1] For instance, if Defendants incur \$30,000 in costs, there would only be \$70,000
 28 available for settlement.

1 as Exhibit "K." Due to the full amount of the EPL coverage already being allocated toward
 2 settlement, any additional resources for a settlement offer would have to come from the CGL
 3 carrier and/or Defendants directly. Authority was ultimately provided by the CGL carrier to
 4 provide an additional \$15,000 in authority, subject to Defendants matching any amount
 5 included in an increased settlement offer. *See Correspondence*, attached hereto as Exhibit
 6 "L." Conceivably, such an approach resulted in potential authority up to \$130,000. Due to
 7 Plaintiff accepting \$115,000, instead of the \$130,000 available in potential authority, there
 8 was a misunderstanding among defense counsel as to the re-allocation of the \$15,000
 9 overage.

10 Contrary to Plaintiff's aspersions and personal attacks upon counsel's credibility, the
 11 misunderstanding had nothing to do with defense counsel failing to obtain and/or
 12 communicate authority, but the result of a potentiality occurring that had not been discussed
 13 by Defendants' counsel in formulating strategy (reallocation due to a settlement below
 14 available authority). Resolution of this misunderstanding was concluded the following
 15 Monday, June 22, 2015, the same day the a final agreement was provided to Plaintiff.
 16 Notwithstanding the minor delay resulting from such misunderstandings, a response to
 17 Plaintiff's counsel's proposed revisions were nevertheless provided within 3-4 business days
 18 of receipt, negating any legitimate contention that Defendants were dilatory and/or
 19 intentionally delaying the settlement process. At most, the misunderstanding resulted a 2-3
 20 day delay in finalizing the settlement process. As discussed below, such delay was offset by
 21 the settlement payment being provided five (5) days earlier than estimated.

22 **IV. DEFENSE COUNSEL AND THE INSURERS PROMPTLY PROCESSED THE**
 23 **SETTLEMENT PAYMENT WITHIN THE TIME PERIOD QUOTED AT THE**
 24 **OUTSET OF NEGOTIATIONS.**

25 On June 22, 2015 (at 6:20 p.m.), Wood Smith received a copy of the executed
 26 settlement agreement from Plaintiff's counsel. *See Transmittal of Executed Agreement*,
 27 attached hereto as Exhibit "M." The very next day, June 23, 2015, Wood Smith forwarded
 28 the executed settlement agreement to the CGL and EPL insurers, along with a copy of Wood

1 Smith's W-9, to avoid any potential delays with payment. See *Transmittal to Insurers*,
 2 attached hereto as Exhibit "N." A week after receipt of the settlement agreement, Plaintiff's
 3 counsel began threatening the filing of a Motion to Enforce the Settlement Agreement unless
 4 settlement funds were in his hands by July 3rd. See *Correspondence from Strojnik*, attached
 5 hereto as Exhibit "O." Wood Smith reminded Plaintiff's counsel that the agreement was not
 6 to provide payment by July 3rd, but that payment would be the "earliest possible time
 7 following execution of the agreement, which was understood to be between 30 and 60 days."
 8 See *Correspondence from Wood Smith*, attached hereto as Exhibit "P."

9 On July 2, 2015, Wood Smith received confirmation from the EPL and CGL adjusters
 10 that the checks had been cut and were being sent to Wood Smith to be processed through the
 11 firm trust account. See *Correspondence from Adjusters*, attached hereto as Exhibit "Q." In
 12 an attempt to provide assurances regarding payment, Plaintiff's counsel was apprised via
 13 email of the checks from the EPL carrier totaling \$100,000 (representing exhaustion of the
 14 EPL policy)³, and the anticipated timing for payment of the settlement amount. See
 15 *Correspondence from Wood Smith*, attached hereto as Exhibit "R." Despite such assurances
 16 and notification of impracticality of immediate payment, Plaintiffs' counsel continued to
 17 demand that "payment be in his hands by the end of business on Friday." See
 18 *Correspondence from Strojnik*, attached hereto as Exhibit "S."

19 Per correspondence dated July 2, a mere ten days after receipt of the executed
 20 settlement agreement, Plaintiff's counsel had been provided proof that the checks from the
 21 insurers to Wood Smith's trust account were in the mail and provided a likely payment date of
 22 July 17, 2015, notably five days earlier than the thirty (30) day period estimated as a best case
 23 scenario. See *Correspondence from Wood Smith*, attached hereto as Exhibit "T." The
 24 estimated payment date was premised upon anticipated mailing delays due to the upcoming
 25 4th of July holiday, time necessary for the checks to clear our trust account, and mailing days
 26

27 ³ Counsel advised Plaintiff's counsel that the \$100,000 was only the EPL portion and
 28 that the CGL checks had also been sent via mail as well.

1 associated with interoffice mail⁴. Despite such assurances and estimated delivery date,
 2 Plaintiff's counsel continued to persist that defense counsel breach its employer's corporate
 3 policy and/or prudent business practices by writing a check out of the trust account prior to
 4 the check clearing the financial institution upon which it was drawn. *See Correspondence*
 5 *from Strojnik*, attached hereto as Exhibit "U."

6 The full correspondence between the parties, not simply the cherry-picked portion
 7 selected by Plaintiff's counsel, establishes without question that Wood Smith has taken every
 8 reasonable effort to expedite the settlement of this matter. Wood Smith's obligation was to
 9 process the settlement in the "earliest possible time," which was estimated and known to the
 10 parties to be between 30 and 60 days. Since Wood Smith has exceeded such expectations,
 11 any argument that Defendants have breached the Settlement Agreement is disingenuous at
 12 best.

13 **V. CONTRACTS ARE TO BE INTERPRETED SO AS TO ASCERTAIN THE**
 14 **INTENT OF THE PARTIES IN ORDER TO ENFORCE THAT INTENT.**

15 A general principle of contract law is that when parties bind themselves by a lawful
 16 contract, the terms of which are clear and unambiguous, a court must give effect to the
 17 contract as written. *Grosvenor Holdings, L.L.C., v. Figueroa*, 222 Ariz, 588, 593, ¶ 9, 218
 18 P.3d 1045, 1050 (App.2009). In order to determine the parties' intent, courts consider "the
 19 plain meaning of the words in the context of the contract as a whole." *Id.* Here, the parties
 20 understood that payment would be made "by Defendants and/or its insurers." *See Fully*
 21 *Executed Settlement Agreement, Covenant 1*, attached hereto as Exhibit "V." The parties
 22 fully anticipated that insurers' policies and procedures would impact the timing of payment.
 23 Indeed, such policies and procedures were expressly provided to Plaintiff's counsel prior the
 24 settlement agreement being executed and it was understood timing would be between thirty

25 ⁴ All Wood Smith trust account deposits and withdrawals are processed through our
 26 firm headquarters in Los Angeles, California. An interoffice mail processing system collects
 27 checks and mail each night to deliver to Los Angeles and vice versa. For instance, a check
 28 received on a Tuesday will be mailed to Los Angeles Tuesday night and deposited
 Wednesday.

1 (30) and sixty (60) days.

2 Plaintiff argues the phrase "within the earliest possible time period following the
3 execution of the Agreement" should be interpreted as requiring payment within 48 hours.
4 See Motion, page 6. Arizona courts adopt a permissive approach to the parol evidence rule.
5 See *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138
6 (1993). The Judge is to first consider the offered evidence, i.e. negotiations between the
7 parties as to the estimated time period for payment, and if the Court believes the language is
8 reasonably susceptible to the interpretation asserted by the proponent, the evidence is
9 admissible to determine the meaning intended by the parties. *Id.* Thus, even when a
10 contract is clear on its face, which the phrase "within the earliest possible time" is most
11 certainly not, the court is still required to engage in a preliminary consideration of extrinsic
12 evidence to see whether it creates ambiguity. The facts of this case are simple and
13 straightforward, Defendants originally requested a time period of thirty (30) to sixty (60)
14 days, to which Plaintiff initially requested that payment be issued within eight (8) days,
15 ultimately agreeing to thirty (30) days. See *Proposed Revisions from Plaintiff's counsel*,
16 attached hereto as Exhibit "W." Due to Defense Counsel's belief that payment may take
17 longer and the inability to commit to thirty (30) days, a compromise was reached whereby
18 payment was to be provided "within the earliest possible time," irrespective of whether such
19 time ends up being 14, 27, 35 or 60 days. See Exhibit "V."

20 Given the open ended nature of the language and best efforts undertaken by Defense
21 counsel as summarized herein, Defendants cannot be held to have breached the Settlement
22 Agreement in any manner.

23 VI. CONCLUSION

24 As set forth herein, Wood Smith has provided payment precisely as described at the
25 very outset of negotiations. Plaintiff's counsel may disagree with the policies and procedures
26 and/or believe them to be unnecessary, but his personal opinion does not change the facts.
27 Insurance carriers are permitted to establish procedures for the issuance and tracking of
28 settlement payments. Similarly, law firms are permitted to centralize trust account access to

1 minimize the possibility of abuse and require that checks directed to their trust account clear
2 the financial institution before dispersing to opposing counsel. Inevitably, these protocols
3 and safety mechanisms may result in settlement checks being delivered to opposing counsel
4 longer than they would prefer, which is precisely why such procedures are disclosed at the
5 very outset of negotiations. Plaintiff's counsel cannot legitimately argue surprise as to the
6 timing of payment.

7 Finally, in conjunction with providing notice of the anticipated timing of payment,
8 Defendants' counsel sought the withdrawal of Plaintiff's Motion to avoid the unnecessary
9 time and expense associated with filing a Response. *See Correspondence from Strojnik*,
10 attached hereto as Exhibit "X." Despite payment being made within the thirty (30) day
11 originally estimated, Plaintiff's counsel flatly and unequivocally refused. See Exhibit "X."
12 Consequently, Defendants respectfully request an award of their attorneys' fees pursuant to
13 Covenant 14 of the Settlement Agreement, providing for an award of attorneys' fees to the
14 prevailing party. See Exhibit "V."

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1 RESPECTFULLY SUBMITTED this 20th day of July, 2015.

2
3 HYMSON GOLDSTEIN & PANTILIAT, PLLC

4
5 By: 

6 EDDIE A. PANTILIAT

7 *Attorneys for Defendants Two Fingers, LLC*
8 *dba Stone and Vine Urban Italian Restaurant,*
9 *Four Fingers, LLC dba Salt & Lime Modern*
Mexican Grill, Six Fingers, LLC dba Black &
Bleu Restaurant, and Joseph M. Popo and
Gabriella Popo

10 WOOD, SMITH, HENNING & BERMAN LLP

11
12 By: 

13 JASON R. MULLIS

14 *Attorneys for Defendants Two Fingers, LLC*
15 *dba Stone and Vine Urban Italian Restaurant,*
16 *Four Fingers, LLC dba Salt & Lime Modern*
17 *Mexican Grill, Six Fingers, LLC dba Black &*
Bleu Restaurant, and Joseph M. Popo and
Gabriella Popo

18 CERTIFICATE OF SERVICE

19 I hereby certify that on the 20th day of July, 2015, the foregoing document entitled,
20 **DEFENDANTS TWO FINGERS, LLC, FOUR FINGERS, LLC, SIX FINGERS, LLC,**
21 **AND JOSEPH M. POPO AND GABRIELLA POPO'S RESPONSE TO PLAINTIFF'S**
22 **MOTION TO ENFORCE SETTLEMENT AGREEMENT AND FOR ATTORNEYS'**
23 **FEES AND SANCTIONS** was e-filed and served via electronic service through the United
24 States District Court for the District of Arizona's ECF System and to the following ECF
25 registrants:

26 Peter K. Strojnik
27 THE STROJNIK FIRM L.L.C.
28 Esplanade Center III
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